U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 December 2003

CASE NO.: 2003-BLA-5852

In the Matter of:

ROY J. JOHNSON
Claimant

v.

GAMBLE COALS, INC.
Employer

and

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

Robert F. Cohen, Jr.
For the Claimant

Robert Weinberger, Esq.
For the Employer/Carrier

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Elkins, West Virginia on August 19, 2003 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-38, claimant's exhibits (CX) 1-3, and employer's exhibits (EX) 1-2 were admitted into evidence. The deposition testimony of Dr. John E. Parker was submitted post hearing and has been received in evidence as CX 4. Both parties filed post hearing briefs.

ISSUES

I. Existence of pneumoconiosis.

II. Causal relationship of pneumoconiosis and coal mine employment.

III. Causation of total disability.

IV. Material change in conditions.

The parties have stipulated that claimant has a totally disabling pulmonary impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [1]

Procedural History

Roy J. Johnson (claimant or miner) filed his first claim for benefits on May 10, 1973. (DX 1) The claim was denied by the Social Security Administration and the Department of Labor and claimant filed his second claim on June 15, 1982. (DX 1, DX 2) That claim was denied on June 26, 1984 because the evidence did not establish total disability due to pneumoconiosis. (DX 2) Claimant filed the present claim on March 18, 2002. (DX 3) The district director denied the claim on January 28, 2003, claimant requested a hearing, and the case was referred to the Office of Administrative Law Judges on May 29, 2003. (DX 30, DX 31, DX 35)

Background

Claimant was born on April 2, 1933 and his only dependent is his wife, Clifta. (DX 3, DX 14) His Social Security earnings statement shows that he earned at least $50.00 in seventy six quarters for the coal mine companies he identified in the coal mine employment form in

[1] The following abbreviations have been used in this opinion: DX=Director's exhibit, CX=claimant's exhibit, EX=employer's exhibit, TR=transcript of hearing, BCR=board certified radiologist, B=B reader.

DX 6, and therefore I credit him with nineteen years of coal mine employment.[2] Claimant's coal mine employment included work as a roof bolter. (TR 21) His coal mine employment ended in 1982 due to a back injury although he was also short of breath at the time. (TR 23) Claimant started smoking cigarettes at age twelve but never smoked more than one or two cigarettes a day. (TR 24) He stopped smoking in 2002. (TR 29) Claimant takes three breathing medications. (TR 27)

Medical Evidence

Chest x-rays

Exhibit	Date	Physician	Interpretation
DX 1	8/20/73	Furnary	0/0
DX 1	8/20/73	Wheeler	0/0
DX 1	9/20/73	Scott	1/1, p/p
DX 1	8/15/80	Abdalla, BCR	1/1q
DX 2	3/8/83	Mang, BCR, B	1/0 p
DX 2	3/8/83	Cole, BCR, B	1/0, q/s
DX 21	6/3/02	Bellotte, B	0/1, q/t
DX 22	6/3/02	Gaziano, B	unreadable
CX 1	6/3/02	Parker, B	1/2, q/q, B
EX 1	6/3/02	Wiot, BCR, B	negative for pneumoconiosis
DX 23	7/23/02	Bellotte, B	0/1, q/t
DX 24	7/23/02	Gaziano, B	quality 2
EX 2	4/2/03	Renn, B	0/0
CX 4	4/2/03	Parker, B	1/2, q/q, B

X-rays dated January 19 and January 22, 1982 were not read for the presence of pneumoconiosis. (DX 2)

Pulmonary Function Studies

Exhibit	Date	Height	Age	FEV1	FVC	MVV
DX 1	10/17/73	---	40	2.376	---	59
DX 1	8/15/80	72 in.	47	2.5	3.8	86
DX 2	3/8/83	69 in.	49	1.59	2.03	61
DX 19	6/3/02	69 in.	69	0.86	3.32	26
CX 1	12/4/02	69 in.	69	1.24	3.13	---
				1.52*	3.93*	---
EX 2	4/203	70 in.	70	0.90	2.47	31
				0.96*	2.37*	33*

*post bronchodilator

[2] Claimant testified that he worked for several coal companies where he did not get paid (See TR 10-20) but it is impossible to determine from his testimony how many additional years he was employed as a coal miner that are not indicated by the Social Security records, and therefore I will rely on the earnings reflected in these records.

The October 17, 1973 studies were invalid due to poor effort.

Blood Gas Studies

Exhibit	Date	PCO2	PO2
DX 1	8/15/80	39	79
		36*	80*
DX 2	1/19/82	34	73
DX 2	3/8/83	29	79
DX 18	6/3/02	35.3	76.1
CX 1	12/4/02	34.3	88
EX 1	4/2/03	31	83

*exercise values

Medical Reports

Dr. Jerome C. Arnett examined the miner on August 15, 1980 and March 8, 1983. (DX 1, DX 2) On both occasions he diagnosed coal workers' pneumoconiosis arising out of coal mine employment but found no pulmonary disability.

Claimant was hospitalized at Memorial General Hospital from January 19-24, 1982 and was discharged with a diagnosis of chronic low back pain, chronic obstructive pulmonary disease, and musculoskeletal chest pain. (DX 2)

In a letter dated April 4, 1982, Dr. Robert B. Garrett stated that he had been treating claimant since March 1982, and that, as pertinent, claimant has significant bronchospastic lung disease due to a combination of cigarette smoking and coal dust inhalation. (DX 2)

Dr. John A. Bellotte evaluated claimant on June 3, 2002. (DX 17) He noted claimant's coal mine employment and that he had smoked less than one pack of cigarettes a day since age ten. In the pulmonary examination, the AP diameter was increased, the lungs were hyperresonant to percussion, and there was bilateral wheezing. Dr. Bellotte also performed a chest x-ray, pulmonary function studies, and blood gas studies. He diagnosed a mass in the right upper lobe of the lung, COPD, asthma, tobacco abuse, hypertension, and suspected angina pectoris. Dr. Bellotte attributed the lung mass and the COPD to smoking and concluded that the asthma was genetic. He stated that there was no pulmonary diagnosis or etiology related to coal dust exposure. Dr. Bellotte concluded that claimant is 100% disabled by cardiopulmonary disease.

The miner was examined by Dr. Parker on December 4, 2002. (CX 1) Dr. Parker determined that claimant had been employed as a miner for twenty nine years and that he was a lifetime smoker who had stopped smoking in 2002. In the physical examination, he observed a prolonged expiratory phase, expiratory wheezing, and clubbing of the fingers. The pulmonary function studies were consistent with severe airflow obstruction with a bronchodilator response,

the lung volumes showed hyperinflation, the diffusion capacity was severely reduced, and the resting blood gas test was normal. The chest x-ray indicated nodulation consistent with pneumoconiosis as well as a right upper zone mass. Dr. Parker stated that claimant's airflow obstruction is caused by smoking and coal dust and silica exposure, and that he is disabled from coal mine work as a result of airflow obstruction and lung cancer. Dr. Parker cited medical studies that coal dust inhalation can cause chronic obstructive pulmonary disease and that silica is a carcinogen. He opined that claimant's chronic obstructive pulmonary disease and lung cancer are caused by his smoking and occupational exposure as a coal miner.

Dr. Arnett drafted a report dated March 11, 2003 stating that claimant had been his patient since January 1981. (CX 2) He further stated that he sees claimant an average of between one and three times a month, and that during each visit he performs a pulmonary examination, pulmonary function studies, and oximetries. Dr. Arnett reviewed the reports of Dr. Bellotte and Dr. Parker and noted that the diffusion capacity from Dr. Parker's examination was severely impaired. He concluded that claimant suffers from a totally disabling lung impairment caused by his cigarette smoking and coal mine employment. Dr. Arnett also concluded that claimant's coal dust exposure makes a significant contribution to his pulmonary impairment because his FEV 1 was low when he stopped working in 1982 and it has not significantly worsened since his retirement.

Dr. Joseph Renn examined claimant on April 3, 2002. (EX 2) He determined that claimant had worked one day a week in the coal mines from 1950 to 1963 and full time in the mines from 1974 to 1982, and that he had smoked two cigarettes a day from 1945 to 2002. Dr. Renn noted expiratory wheezes, a prolonged expiratory phase, and diminished breath sounds in the physical examination. He classified the chest x-ray as 0/0. The spirometry showed a very severe obstructive ventilatory defect that did not improve with bronchodilators, the MVV was severely reduced, the lung volumes showed a moderately severe restrictive ventilatory defect, the diffusing capacity was severely reduced, and the resting blood gases were normal. Dr. Renn's respiratory diagnoses were chronic bronchitis, pulmonary emphysema, and carcinoma of the lung due to cigarette smoking, a very severe obstructive ventilatory defect due to bronchitis and emphysema, and a moderately severe restrictive ventilatory defect due to lung cancer and radiation. He attributed these respiratory conditions to cigarette smoking rather than to coal dust exposure. He also found that claimant is totally disabled by his respiratory impairment. Dr. Renn asserted that he was able to determine that the miner's respiratory impairment was caused by cigarette smoking rather than coal dust exposure because his chronic bronchitis would have disappeared shortly after his retirement in 1982 if it were due to coal dust exposure, and because he has developed wheezing since 1997 which does not occur with coal workers' pneumoconiosis. He also relied on claimant's wheezing which he attributed to asthma, the disproportionate reduction of the volumes and flows in the spirometry, the moderately severe restrictive ventilatory defect indicated by the lung volumes, and the severely reduced diffusing capacity, all of which are atypical for coal workers' pneumoconiosis. Dr. Renn also cited medical studies for the proposition that lung cancer does not occur more frequently among coal miners than in the general population.

Dr. Parker was deposed on September 3, 2003. (CX 4) Dr. Parker is board certified in pulmonary diseases and is currently the chief of Pulmonary and Critical Care Medicine at West

Virginia University School of Medicine. Id at pp 3, 4. See also CX 2. He testified that the large opacity he observed on the June 3, 2002 x-ray was a neoplasm not complicated pneumoconiosis. Id at p. 15. He reaffirmed his conclusion that claimant has a severe airflow obstruction caused by smoking and coal dust exposure. Id at p. 16. He was unable to separate out the effects of each cause. Id. He noted that the miner had worked as a roof bolter which exposed him to silica and which contributed to the development of his lung cancer. Id at pp. 16-17. Dr. Parker stated that claimant would be totally disabled by his airflow obstruction even if he did not have lung cancer. Id at p. 18. If claimant's x-ray was negative for pneumoconiosis, Dr. Parker would still conclude that his pulmonary impairment was due to coal dust exposure. Id at p. 23. If it were found that claimant was employed as a coal miner for sixteen years instead of twenty nine years, it would not change his opinion that his pulmonary disease arose out of his coal mine employment. Id at p. 24. Dr. Parker agreed with Dr. Renn that claimant does not have industrial bronchitis. Id at p. 25. He disagreed with Dr. Renn that wheezing is not present in coal dust related pulmonary diseases, that a disproportionate reduction in volumes and flows in the spirometry is inconsistent with pneumoconiosis, that pneumoconiosis does not cause the degree of restriction that claimant has, and that a severely reduced diffusing capacity is not typical of coal dust related lung diseases. Id at pp. 25-30. Dr. Parker also took issue with Dr. Bellotte's diagnosis of asthma based on the reversibility of the pulmonary function studies as the miner's pulmonary function studies were only slightly improved with bronchodilators which is not typical of asthma. Id at pp. 31-32.

Conclusions of Law

The present claim was filed more than one year after the denial of the miner's prior claim and it is therefore considered a subsequent claim. See § 725.309(d). In subsequent claims, the claimant must show a material change in conditions, i.e., he must demonstrate that the evidence developed since the denial of the prior claim establishes at least one of the elements of entitlement previously adjudicated against him. See § 725.309(d), *Lisa Lee Mines v. Director, OWCP*, 86 F. 3d 1358 (4th Cir. 1996)(en banc). As the miner's prior claim was denied because the evidence did not establish that he is totally disabled due to pneumoconiosis, the parties' stipulation that claimant now has a totally disabling pulmonary impairment establishes a material change in conditions as a matter of law. All of the evidence of record must be evaluated to determine if the miner is entitled to benefits. *Lisa Lee Mines.*

Benefits are provided to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. § 718.204(a). Claimant has the burden of proving by a preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled as a result. *Gee v. W. G. Moore & Sons, Inc*., 9 BLR 1-4 (1986). A finding of the existence of pneumoconiosis may be made based on chest x-rays, autopsies or biopsies, the presumptions in §§ 718.304, 718.305, or 718.306, and the reasoned medical opinion of a physician that the miner has pneumoconiosis as defined in § 718.201.[3] § 718.202(a)(1)-(4). All types of relevant evidence must be weighed to determine if the miner has pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F. 3d 203 (4th Cir., 2000).

[3] Pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, and it includes both medical, or clinical, pneumoconiosis and statutory, or legal pneumoconiosis.

There is no biopsy evidence in the record and claimant is not eligible for the enumerated presumptions. The chest x-rays and medical opinions must therefore be weighed to determine if the miner has pneumoconiosis. The x-ray interpretations of physicians who are both board certified radiologists and B readers are entitled to the most weight. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Three dually qualified physicians have interpreted chest x-rays in this case and two of them (Dr. Mang and Dr. Cole) diagnosed pneumoconiosis, while only one (Dr. Wiot) found no evidence of pneumoconiosis. Positive x-ray readings were also made by Dr. Abdalla, a board certified radiologist, and Dr. Parker, a B reader. There are two other negative x-ray readings by physicians whose qualifications are of record, Dr. Bellotte and Dr. Renn, but they are B readers and not board certified radiologists. On balance, a preponderance of the x-ray evidence is positive for pneumoconiosis.

In evaluating the medical opinions, I give little weight to the diagnoses of pneumoconiosis by Dr. Arnett in his 1980 and 1983 reports and by Dr. Garrett as they are not supported by any rationale and are therefore unreasoned. *Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149 (1989)(en banc). Dr. Bellotte's opinion finding that the miner's pulmonary impairment is entirely due to cigarette smoking and asthma is also not credible as he offered no explanation for eliminating claimant's coal dust exposure as a significant cause of his pulmonary impairments. *See Clark.* Dr. Arnett's 2003 report is entitled to great weight as he has been treating the miner for his pulmonary conditions for twenty one years, he sees the miner between one and three times a month, and he performs pulmonary examinations, pulmonary function studies and oximetries on clamant. See § 718.104(d). His opinion that the miner's coal dust exposure made a significant contribution to his pulmonary impairment is also well reasoned as he referred to the fact that the miner's FEV1 was reduced when he retired from coal mining and has not significantly declined which is substantiated by the pulmonary function study evidence.

I also give considerable weight to Dr. Parker's opinion. Dr. Parker is a highly qualified doctor who heads the pulmonary department of a major hospital and medical school and has published numerous book chapters, articles, and presentations on occupational lung diseases. His opinion is also well reasoned and he based it on the pattern on the pulmonary function studies, claimant's symptoms, the duration and severity of claimant's coal dust exposure, and medical articles finding that exposure to coal dust can cause disabling obstructive pulmonary disease and that exposure to silica can cause lung cancer.

I give much less weight to Dr. Renn's opinion. First, his curriculum vitae shows few published articles or books on occupational lung diseases. Second, he underestimated the length of claimant's coal mine employment. He found that claimant had worked in the coal mines only one day a week from 1950 to 1963 as well as from 1974 to 1982 which would equal between ten and eleven years of coal mine employment, although the evidence demonstrates that claimant was engaged in coal mine work for nineteen years. Dr. Renn's conclusion that claimant's pulmonary disability is due to cigarette smoking and asthma is also poorly reasoned. He stated that claimant does not have industrial bronchitis, a finding with which Dr. Parker agrees. He also cited the presence of wheezing but did not explain why wheezing could not be present in a pulmonary impairment caused by coal dust inhalation. He referred to the disproportionate reduction in the pulmonary function studies without explaining why this supports his conclusion. If Dr. Renn is suggesting that coal dust exposure can not cause obstructive lung disease, his

opinion is contrary to the definition of coal workers' pneumoconiosis. See § 718.201(a)(2). Dr. Renn also referred to the severity of the miner's restrictive defect and the severe reduction in the miner's diffusing capacity as being incompatible with pneumoconiosis without offering an explanation or citing any medical studies. It is noteworthy that Dr. Parker disagreed with Dr. Renn on these points. Dr. Renn did cite medical literature finding that lung cancer is no more common in coal miners than in the general population, but he did not take into account claimant's exposure to significant quantities of silica which may not have been true of the miners in the studies he cited. I therefore find Dr. Parker's opinion that claimant's obstructive pulmonary disease and lung cancer are significantly related to his coal mine employment more credible than Dr. Renn's contrary opinion.

After weighing the chest x-rays and medical opinions, I conclude that claimant has pneumoconiosis.

As claimant has at least ten years of coal mine employment, he is entitled to the rebuttable presumption in § 718.203(b) that his pneumoconiosis arose out of coal mine employment. The record does not contain any credible evidence severing the connection between claimant's pneumoconiosis and his coal mine employment and therefore the presumption has not been rebutted.

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's total disability if it: (i) Has a material adverse effect on his respiratory or pulmonary impairment; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1).

For the reasons crediting the opinions of Dr. Arnett and Dr. Parker and discrediting the opinions of Dr. Bellotte and Dr. Renn, I find that claimant's pneumoconiosis is a substantially contributing cause of his totally disabling pulmonary impairment. The opinions of Dr. Bellotte and Dr. Renn on the cause of claimant's pulmonary disability can also not be credited as neither physician diagnosed pneumoconiosis. *See Scott v. Mason Coal Company*, 289 F. 3d 263, 269 (4th Cir. 2002). I conclude that claimant is totally disabled due to pneumoconiosis.

The evidence establishes all the elements of entitlement. As the evidence does not clearly establish an onset date of claimant's total disability due to pneumoconiosis, benefits will be awarded as of March 1, 2002, the first day of the month in which the claim was filed. § 725.503(b). In the cover letter to his brief, claimant's counsel informed the court that claimant died on November 5, 2003. Benefits will therefore cease as of October 31, 2003. See § 725.203(b). Claimant's counsel has thirty days to file a fully supported fee application and his attention is directed to §§ 725.365 and 725.366. The employer has twenty days to respond with objections.

ORDER

IT IS ORDERED THAT Gamble Coals, Inc. and the West Virginia Coal Workers' Pneumoconiosis Fund:

(1) Pay claimant all the benefits to which he is entitled, augmented by one dependent, beginning as of March 1, 2002 and ending on October 31, 2003.

(2) Pay claimant all the medical benefits to which he is entitled beginning as March 1, 2002 and ending October 31, 2003.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this Decision and Order was filed in the office of the district director, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210